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UNITED STATES ENVIRONMENTAL PROTECTION AGENCY

BEFORE THE ENVIRONMENTAL APPEALS BOARD

In the Matter of Catalina Yachts, Inc.	EPCRA Appeal No. 98-(2)
Docket No. EPCRA-09-94-0015	CATALINA NOTICE OF APPEAL AND SUPPORTING BRIEF

I. Introduction

Respondent Catalina Yachts, Inc. ("Catalina") respectfully appeals the Initial Decision ("Decision") dated February 2, 1998 pursuant to 40 CFR § 22.30. Catalina submits that there was clear error and/or abuse of discretion in the Decision in certain respects because the Decision (a) adheres rigidly to the unpromulgated "Enforcement Response Policy for Section 313 of the Emergency Planning and Community Right-to-Know Act (1986) and Section 6607 of the Pollution Prevention Act (1990)" ("EPCRA ERP"); (b) does not take into full account the relevant statutory factors as heretofore construed by the EAB in determining the penalty; and (c) provides unduly limited credits to the numerous, substantial environmentally beneficial projects voluntarily undertaken by Catalina to reduce its use of EPCRA § 313 toxic chemicals at considerable expense and by which Catalina demonstrated industry leadership. In specific, the Decision relies rigidly upon EPCRA ERP to determine the gravity based penalty even though the EPCRA ERP does not articulate reasons to support the weight assigned to various factors. The Decision also fails to take into account adequately the significant and varied community outreach

efforts voluntarily undertaken by Catalina and appears to weigh form over substance. Finally, the Decision substantially discounts, without supporting analysis, the considerable expenditures voluntarily taken by Catalina to reduce its use of EPCRA toxic chemicals. The discount applied is not in accordance with EAB decisions. Separately, such a discount is especially inappropriate in light of the fact that Catalina's successful initiative was used by a chemical supplier to encourage other boat manufacturers to reduce their use of such chemicals.

II. Argument

In determining an appropriate penalty for EPCRA violations, the administrative law judge ("ALJ") and Environmental Appeals Board ("Board") must evaluate any circumstances that mitigate or aggravate the violation and articulate the reasons that support the penalty. 40 CFR § 27.31. Neither the ALJ nor the Board is bound by the EPCRA ERP, and both "are free to allow for additional penalty reductions in appropriate circumstances". In re: Pacific Refining Company, EPCRA Appeal No. 94-1, Docket No. EPCRA-09-92-0001 (December 6, 1994). Significantly, while such policies "facilitate application of statutory penalty criteria, they *serve as guidelines only and there is no mandate that they be rigidly followed.*" (emphasis added) McLaughlin Gormley King, FIFRA Appeal Nos. 95-2 through 95-7 (March 12, 1996), citing In re James C. Lin and Lin Cubing, Inc., 5 EAB FIFRA Appeal No. 94-2, slip op. at 5 (EAB 1993).

Moreover, an enforcement policy which has never been put out for notice and comment is a non-binding agency policy whose application is open to attack in any particular case. McLaughlin Gormley King, FIFRA Appeal Nos. 95-2 through 95-7 (March 12, 1996). APA principles prohibit the unquestioning application of a penalty policy as if the policy were a rule with "binding effect." In re: Employers Insurance of Wausau and Ground Eight Technology, Inc. Docket Nos. TSCA-V-C-66-90 (February 11, 1997), (slip opinion) 1997 DEN 31 d35. EPA conceded in the instant case that the EPCRA ERP has not been published in the Federal Register or otherwise published for notice and comment. Tr. 44. Moreover, the EPCRA ERP does not articulate reasons in support of its penalty calculation. In the Matter of Hall Signs, Inc., Docket No. 5-EPCRA-96-02 at 6 (October 30, 1997). Consequently, the EPCRA ERP is neither binding nor entitled to special deference, contrary to its use by the ALJ in the instant case.

Federal law provides that persons who violate EPCRA § 313 may be liable for administrative penalties of up to $25,000. 42 USC § 11045(c), EPCRA § 325(c). By setting an upper limit, it is clear that Congress intended that the penalties which are assessed under Section 325(c) be subject to an appropriate degree of discretion depending on facts and circumstances. Apex Microtechnology, Inc. EPCRA-09-92-00-07 (May 7, 1993). Catalina presents herein an appropriate framework to calculate a more appropriate penalty based on the facts and circumstances of this case, in contrast to the assessment imposed by the Decision.

A. Framework for Calculating the Appropriate Penalty

The relevant factors to be considered in determining the appropriate penalties are the factors set forth in the Toxic Substances Control Act, 15 U.S.C. § 2615 ("TSCA § 16"). EPCRA § 325(b)(2). TSCA § 16 provides that determinations of civil penalties shall take into account the following factors: "the nature, circumstances, extent, and gravity of the violation and, with respect to the violator, the ability to pay, effect on ability to continue to do business, any history of prior such violations, the degree of culpability, and such other matters as justice may require."

B. Gravity Based Penalty. The gravity element of the penalty is based on the "nature, circumstance, extent and gravity" of the violation. The Decision assesses a gravity based penalty of $173,274 expressly and rigidly in reliance on the EPCRA ERP. Decision at 29-30. The Decision concludes without supporting analysis that the EPCRA ERP provides a rational basis for this calculation. Decision at 30. Such rigid adherence, however, is inappropriate where EPA has been repeatedly reproached for failure to promulgate the EPCRA ERP and where EPA has failed to articulate support for its policy. McLaughlin, Wausau, Hall Signs, supra.

1. Circumstance. Under the EPCRA ERP which was relied upon by the ALJ in the instant case (Decision at 30), the "circumstance" factor "take[s] into account the seriousness of the violation as it relates to the accuracy and availability of the information to the community, to states and to the federal government." EPCRA ERP at 8. The EPCRA ERP then sets forth six levels ranging from typographic errors (level 6) to failure to timely submit a report (level 1). The EPCRA ERP does not articulate any rationale for these levels. Complainant asserted that Circumstance Level 1 was appropriate for Catalina solely by rigid application of the

ERP and did not take into account the fact that Catalina had submitted data on chemical use and emissions to various local agencies. Finding 18, Decision at 15. In fact, EPA admitted that it failed to take into account reports routinely filed by Catalina with local agencies. Tr. 20.

The "circumstance" factor adjustment would be more rationally and fairly applied if it had taken into consideration whether the company had otherwise provided information to the community on the toxic chemicals at issue. In this case, Catalina filed annually reports on its use of acetone and styrene with the local fire department and annually filed reports on its air emissions with the South Coast Air Quality Management District. Tr. 81-84. Although EPA contends that the filed reports may not contain the identical information as in the Form R report, this is merely an argument of form over substance. Moreover, EPA's witness admitted that EPA was made aware of these submissions but failed to investigate in any way those submissions. Finding 19, Decision 16. While the Decision recognizes the substantial submissions to local agencies, the Decision accepts without analysis EPA's assertion that because local agencies require the information in a different "format", Catalina has not provided the local agencies and the community with sufficient information. Decision at 39-40. EPA presented no evidence that the information was inadequate or that either the local agencies or the community ever requested any additional information from Catalina. By contrast, Catalina's witness testified that Catalina had not been cited by the local agencies with respect to reporting on releases and use of materials or for any other violations. Decision at 25.

Separately, during all relevant time periods and continuing to the present, Catalina has engaged in multiple and meaningful community outreach programs. Catalina has a policy of open response to citizens who seek information on Catalina's operations. Tr. 100. In addition, since 1986, Catalina has sponsored community education programs during its weekly tours of its plant. Tr. 101-102. Moreover, to assure that the community is aware of this opportunity, Catalina advertises its tours both at its plant and in the local newspaper. Tr. 103. Finally, Catalina also hosted a two day "open house" of its plant in which the community was invited to tour the plant. Tr. 103-4. Catalina provided food and music, and 2,000 people attended. Tr. 104.

Based on both the numerous filings with local agencies and the exemplary community

outreach, an assessment of 50% (25% each for the filing of satisfactory reports with local agencies and community outreach) for the "circumstance factor would be more appropriate than the Decision's rigid adherence to EPCRA ERP. In this regard, the Decision's conclusion "that prima facie the EPCRA ERP provides a reasonable basis for determining the gravity based penalty ..." reflects unwarranted deference to the EPCRA ERP, notwithstanding the ALJ's generally favorable assessment within that context.

2. Extent. Under the EPCRA ERP, the "extent" factor is in turn based on company "size" and amount of chemical used relative to the regulatory thresholds.

a. Company Size. The EPCRA ERP, relied upon in the Decision, expresses the "size" of the business in terms of whether the company has less than or more than 50 employees and annual sales of $10 million or more. EPCRA ERP at 9. The EPCRA ERP provides that the penalties can vary by more than a factor of ten solely on the basis of "company size". At the hearing, Complainant followed rigidly the EPCRA ERP in defense of its proposed assessment Finding 16, Decision at 13. As noted in Hall, supra, "[t]he ERP also does not explain how the size of the violator's business relates to the gravity of the violation. ... There is nothing in EPCRA that indicates that the size of the business of the violator should be a significant penalty factor." Hall, at 6. Indeed, when "the penalty can vary by a large magnitude due to small differences among violators, unrelated to the violation itself, that portion of the policy is inconsistent with its own stated purpose to impose penalties in a 'fair' manner and to ensure 'that the enforcement response is appropriate to the violation committed.' ... It would be a simple matter to construct a matrix or sliding scale with greater flexibility ..." Hall at 5.

A more rational basis to be employed by the ALJ in determining a penalty scale based on company size is the Small Business Administration ("SBA") definition of "small businesses concerns" which takes into account numerous factors in setting a definition for each industry sector. The "extent" factor could be set on a 1-5 scale; companies that meet the SBA size standards could be assigned 20% of any "extent" factor penalty and while those companies that exceed by a factor of 5 the SBA size standards could be assigned 100% of any "extent" factor penalty.

As applied to the case at hand, Catalina is classified in Standard Industrial Classification ("SIC") Code 3732 Boat and Boat Building (Finding 3) and had $40 million in gross sales. Finding 12. According to SBA regulations, manufactures (including SIC Code 3732) are "small business concerns" if they have fewer than 500 employees or $500 million in annual receipts. 13 CFR § 121.201. Catalina had approximately 230 employees at its Woodland Hills, California plant during the relevant time period and 130 employees at its other plant in Florida. Tr. at 81. Consequently, because Catalina had fewer than 500 employees and annual receipts of less than $500 million, it should be assigned no more than 20% of the "extent" factor.

b. Amount of Chemical Used. The EPCRA ERP followed by the ALJ (Decision at 30) simply separates companies on the basis of whether or not a company uses more than ten times the regulatory thresholds. EPCRA ERP at 9. This approach appears to be insensitive to potential risks posed by these chemicals. For example, the styrene at issue was a component of a resin, and common sense concludes that the potential risk posed by a chemical imbedded in a resin is not as great as a gaseous material. In addition, the simplistic approach of the EPCRA ERP fails to take into full account the significance of delisting a toxic chemical. The Decision, following the EPCRA ERP, provides only a 25% downward adjustment based on the delisting by EPA of acetone as an EPCRA toxic chemical during the pendency of the enforcement action. Decision at 33. This 25% downward adjustment does not adequately reflect the significance of a delisting. EPA expressly acknowledged in the delisting notice that acetone did not meet the statutory criteria for listing under EPCRA Section 313. 60 Fed.Reg. 31645; Respondent's Exhibit 8. A more rational and fair approach would be to adjust downward the gravity based penalty associated with acetone use by 80%.

3. Calculation of Gravity Based Penalty.

Catalina was found liable for failure to submit timely two Form R reports for acetone usage in 1989 and 1990 and five Form R reports for styrene usage in 1989-1992. Decision at 27-29. Based on the analysis of the statutory factors presented above, the gravity based penalty imposed by the ALJ should be as follows:

EPCRA § 325(c) provides for penalties of up to $25,000 per report. Because acetone

was delisted, the base penalty for the two acetone reports should be:

2 x $25,000 x 20% = $10,000.

The base penalty for the five styrene reports should be:

5 x $25,000 = $125,000.

Thus, the total base penalty for both acetone and styrene is $135,000.

The base penalty is then adjusted downward by 50% for the "circumstance" factor and by 20% for the "extent factor. The final gravity based factor, then, is:

$135,000 x 50% x 20% = $13,500.

C. Adjustments

1. History of Prior Such Violations. The EPCRA ERP provides for only an upward adjustment for companies with prior violations. EPCRA ERP at 16-17. There is clearly no rational basis for the failure to provide a downward adjustment for companies with no prior violations. As recognized in the Decision, "the penalty adjustment factors in TSCA Section 16 may not be compartmentalized and the absence of prior violations is a factor to be considered in determining whether a respondent is a good corporate citizen and thus entitled to favorable consideration as to other aspects of the penalty calculation." Decision at 33. With respect to companies with a history of no violations, as here, a rational basis and approach would be to provide for a 25% upward adjustment to the gravity based penalty for prior violations and a 25% downward adjustment for absence of violations.

2. The Degree of Culpability. While Catalina agrees with the adjustment downward by 15% each for its undisputed cooperation and timely compliance (Decision 33-35), Catalina concludes that another significant factor, that of "knowledge of the requirement" or lack thereof, should be taken into account. Clearly, a company that knew of its obligation and failed to comply is more culpable than a company that was not aware of an obligation. EPA presented no evidence that Catalina was aware of its obligation to file Form R reports. Catalina testified that its Woodland Hills plant was unaware of the obligation to file Form R reports. Tr. 91. Catalina took reasonable steps to identify and prepare applicable reports once it was made aware of its obligation. Tr. 91. Catalina did not obtain any economic benefit or savings as a result of the

untimely filing of the Form R reports. Tr. 97.

It is rational that a knowing violation displays greater culpability than an innocent omission and, consequently, a further 25% reduction for innocence is appropriate along with the 30% reduction for cooperation and timely compliance.

3. Other Factors as Justice May Require. The EAB recognized in In re Spang & Company, EPCRA Appeals Nos. 94-3 & 94-4, that environmental "good deeds" are to be looked upon favorably and that such expenditures can be used to adjust downward any penalty under the "other factors as justice may require" penalty adjustment factor. The Decision recognizes the considerable expenses incurred by Catalina on environmentally beneficial projects. Tr. 35-39. Significantly, however, it only credited Catalina with 30% of the $230,000 of expenses the Decision calculates as associated with Catalina's environmental projects. Decision at 39. Importantly, the Decision does not provide any rationale for the nominal 30% credit. Id. By contrast, the EAB in Spang would have allowed a penalty reduction of 71%. Spang at 30. The minimal credit in the instant case could have the effect of discouraging environmental leadership and fails to comport with the teaching of Spang which expressly recognizes the compelling logic of looking "favorably upon the undertaking of a project which benefits the environment and which goes beyond the requirements of environmental laws .. [to] provide an incentive for companies to engage in environmentally beneficial activities". Spang at 28.

As the EAB has recognized, the "justice factor" is especially appropriate when the nexus between the project and the alleged violation is strong. Spang. On its own initiative, Catalina drastically reduced its acetone emissions beginning in 1990. Finding 5, Decision at 7. Catalina presented undisputed evidence that it voluntarily incurred significant capital and ongoing operating expenses to replace acetone during the time that acetone was a designated EPCRA Section 313 toxic chemical. Decision at 24. These expenses included approximately $30,000 in capital costs to install the equipment to recycle the substitute material (Tr. 110), $12,000-14,000 annual costs to operate the recycling equipment (Tr. 110), and the annual increased labor costs of $35,000-40,000 because the replacement solvent was less efficient than acetone (Tr. 110-111). Catalina testified that the increased operating and labor costs had been incurred since 1993. Tr.

109-110. Consequently, there were over three years of such increased costs up until the time of the hearing. Taking the average of the increased operating and labor costs, Catalina incurred approximately $40,500 annually in addition in addition to the $30,000 capital investment. These expenses have a direct nexus to the alleged violation.

This voluntary undertaking by Catalina was initiated well in advance of EPA's initial site inspection. Tr. 109. "[A] project commenced before an enforcement action has begun is more likely to show a greater commitment to environmental protection than one commenced after." Spang at 29. Most impressively, Catalina presented undisputed evidence that as a direct result of Catalina's environmental leadership, the supplier of the replacement for acetone was able to convince other boat manufacturers to make a similar switch. Tr. 111-3; Pepiak Decl., Respondent's Exhibit 6.

Catalina provided additional evidence that it voluntarily undertook other environmentally beneficial projects. For example, in 1994, it eliminated applications of anti-fouling paints to boat bottoms which resulted in lost annual profits of 28,00-30,000. Finding 33, Decision at 36. Importantly, Catalina testified that some chemicals in the anti-fouling paints were EPCRA listed toxic chemicals (but they were not subject to Form R reports because they were used in amounts below reporting thresholds). Finding 33, Decision at 25-6. Because the anti-fouling paints contained toxic chemicals, appropriate credit should be given to this action. Catalina recently substituted brush application of gel coat (which contains styrene) for spray applications of gel coat at an increase in annual operating costs of $16,000-20,000. Tr. 114-116. On average, the lost annual profits from the cessation of anti-fouling painting and the increased operational costs for brushing instead of spraying are approximately $47,000. These costs are directly related to the enforcement action.

In light of the substantial and laudatory efforts by Catalina and in order to further encourage such efforts, no discount should be applied to the acetone substitution, and a 70% credit for the other environmentally beneficial projects relating to reduction of EPCRA toxic chemicals is appropriate.

III. Calculation of Adjusted Penalty.

The proposed gravity based penalty of $13,500 should be adjusted downward by the "history of violation" and "culpability" factors as follows:

$13,500 x 30% x 25% x 25% = $253.13.

This penalty should then be fully offset by the expenditures and profit losses associated with the numerous and significant environmentally beneficial projects that Catalina voluntarily undertook.

For all of the foregoing reasons, Catalina respectfully requests the EAB to reject the penalty assessed in the Decision, and to substitute a zero penalty in lieu of that imposed by the Decision.

Dated: March 26, 1998

Respectfully submitted,

BEVERIDGE & DIAMOND LLP

By: Eileen M. Nottoli /ctz

Eileen M. Nottoli

Attorneys for Catalina Yachts, Inc.

CERTIFICATE OF SERVICE

I hereby certify that copies of the foregoing CATALINA NOTICE OF APPEAL AND SUPPORTING BRIEF in the matter of Catalina Yachts, Inc., EPCRA Appeal No. 98-(2), were sent to the following persons in the manner indicated:

Original and One Copy
Hand Delivered to:

Eurika Stubbs
Staff Assistant
Environmental Appeals Board
USEPA Weststory Building
607 14th Street, N.W., 5th Floor
Washington, DC 20005

and by U.S. Mail to:

David M. Jones, Esq.
Office of Regional Counsel, RC-2-1
United States EPA, Region 9
75 Hawthorne Street
San Francisco, CA 94105

Date: March 26, 1998

Geoffrey T. Cullen

BEFORE THE ENVIRONMENTAL APPEALS BOARD
UNITED STATES ENVIRONMENTAL PROTECTION AGENCY
WASHINGTON, D.C.

In re:	)	
	)	
Catalina Yachts, Inc.,	)	EPCRA Appeal No. 98-(2)
	)	
Docket No. EPCRA-09-94-0015.	)	
	)	

ORDER GRANTING EXTENSION OF TIME

By motion dated March 17, 1998, complainant the U.S. EPA, Region IX (the "Region") has moved the Board for an additional extension of time to file its notice of appeal and supporting brief in the above-captioned matter ("Region's Motion"). By motion dated March 17, 1998, respondent Catalina Yachts, Inc. ("Catalina") also has moved the Board for an additional extension of time to file a notice of appeal and appellate brief in the above-captioned matter ("Catalina's Motion"). The Board has previously entered orders granting both the Region and Catalina through and including March 19, 1998, to file their notices of appeal and supporting briefs in this matter. Now, both the Region and Catalina request an additional seven-day extension of time to file their appeals. Both parties represent that the other consents to the requested extension of time.

Upon consideration, the Region's Motion and Catalina's Motion are hereby granted. Should either party decide to pursue an appeal of the Initial Decision issued in the above-captioned matter, it must file its notice of appeal and appellate brief

with the Board on or before Thursday, March 26, 1998. The Board's time for deciding whether to review the decision *sua sponte*, pursuant to 40 C.F.R. § 22.30(b), shall also be extended an additional seven days to and including Monday, April 20, 1998 (which is 25 days after the deadline for the Region and Catalina to file their appeals).

So ordered.

ENVIRONMENTAL APPEALS BOARD

By: _____
Edward E. Reich

Edward E. Reich
Environmental Appeals Judge

Dated: MAR 18 1998

CERTIFICATE OF SERVICE

I hereby certify that copies of the foregoing Order Granting Extension of Time in the matter of Catalina Yachts, Inc., EPCRA-98-(2), were sent to the following persons in the manner indicated:

By facsimile and
Pouch Mail:

David M. Jones, Esq.
Office of Regional Counsel
U.S. Environmental Protection Agency
75 Hawthorne Street
San Francisco, CA 94105-3901
Facsimile No. (415) 744-1041

By facsimile and
Certified Mail,
Return Receipt Requested:

Eileen M. Nottoli, Esq.
Beveridge & Diamond
One Samsome Street, Suite 3400
San Francisco, CA 94104
Facsimile No. (415) 397-4238

Dated: MAR 18 1998

Annette Duncan
Secretary

UNITED STATES
ENVIRONMENTAL PROTECTION AGENCY
REGION 9

In re:	Docket No. EPCRA-09-94-0015
CATALINA YACHTS, INC.,	MOTION FOR ADDITIONAL TIME TO FILE NOTICE OF APPEAL AND BRIEF IN SUPPORT THEREOF
Respondent.	

COMES NOW THE COMPLAINANT, the United States Environmental Protection Agency, Region 9, by its counsel of record, David M. Jones, pursuant to the authority set forth at 40 C.F.R. §§ 22.16 and 22.30 and moves the Environmental Appeals Board for an additional seven days from March 19, 1998, to file the notice of appeal and appellate brief authorized by Section 22.30(a) of the Consolidate Rules regarding the Initial Decision in the above-entitled matter dated February 2, 1998.

The seven days sought by this motion is to permit Region 9 time to coordinate the appellate brief to be filed with the Board with the Office of Enforcement and Compliance Assurance ("OECA") in Washington, D. C. The seven days sought by this motion is an addition to the time granted by the Board in the Order Granting Extension Of Time dated February 25, 1998.

The additional seven days sought by Complainant is solely to

permit the appropriate officials at OECA to review and approve the Region's brief to be filed on appeal and is not intended to achieve an unfair advantage nor to prejudice Respondent, Catalina Yachts, Inc.

Counsel for Catalina Yachts, Inc. has no objection to the additional time sought by this motion on the condition that an additional seven days can be granted to Catalina Yachts, Inc. on the basis of their motion for additional time.

Dated: March 17, 1998.

Respectfully submitted,

David M. Jones
Counsel for Appellant

CERTIFICATE OF SERVICE

I hereby certify that the original copy of the foregoing Motion For Additional Time To File Notice of Appeal and Brief In Support Thereof was filed with the Regional Hearing Clerk, Region 9 and that a copy was sent by facsimile and First Class Mail to:

Clerk of the Board
Environmental Appeals Board
United States Environmental Protection Agency
607 14th Street, N.W. Suite 500
Washington, D.C. 20005
FAX (202) 501-7580

and by First Class Mail to:

Robert D. Wyatt, Esquire
James L. Meeder, Esquire
Eileen M. Nottoli, Esquire
BEVERIDGE & DIAMOND
One Samsome Street, Suite 3400
San Francisco, CA 94104

3/17/98
Date

Office of Regional Counsel
U. S. Environmental Protection
Agency, Region 9

UNITED STATES ENVIRONMENTAL PROTECTION AGENCY

BEFORE THE ADMINISTRATOR

IN THE MATTER OF:	)	
	)	
CATALINA YACHTS, INC.,	)	DOCKET NO. EPCRA-09-94-0015
	)	
	)	
RESPONDENT	)	

Emergency Planning and Community Right-To-Know Act - Violations of Section 313 - Determination of Penalty.

Statutory criteria for determination of penalty provided by EPCRA § 325(c) for violation of § 313 toxic chemical reporting requirement are those for a Class II penalty set forth in § 325(b)(2), which refers to and incorporates the penalty provision in § 16 of the Toxic Substances Control Act, 15 U.S.C.§ 2615.

Emergency Planning and Community Right-To-Know Act - Penalty for Violations of Section 313 - Enforcement Response Policy (ERP).

Where Agency elected to determine penalty for violations of § 313 toxic chemical reporting requirement in accordance with ERP, it could not refuse to allow as mitigation factors provided by the ERP because of its practice of considering such matters only in settlement negotiations. Environmentally beneficial expenditures voluntarily incurred by respondent held to be within the criterion "such other matters as justice may require," justifying a reduction in the gravity based penalty.

Appearance for Complainant: David M. Jones, Esq.
Assistant Regional Counsel
U.S. EPA, Region IX
San Francisco, CA 94105

Appearance for Respondent: Robert D. Wyatt, Esq.
James L. Meeder, Esq.
Eileen M. Nottoli, Esq.
Beveridge & Diamond
San Francisco, CA 94104

INITIAL DECISION

The complaint in this proceeding under Section 325(c) of Title III of the Superfund Amendments and Reauthorization Act, 42 U.S.C. §§ 11001 et seq.(SARA), also known as the Emergency Planning and Community Right-to-Know Act of 1986 ("EPCRA"), filed on June 20, 1994 by the Director, Air & Toxics Division, EPA Region IX ("Complainant"), charged Respondent, Catalina Yachts, Inc., with seven counts of violating EPCRA § 313. Counts I and II alleged that Catalina "otherwise used" quantities of acetone during the calendar years 1988 and 1989 in excess of the established threshold of 10,000 pounds and failed to submit toxic chemical release forms (Form Rs) to the Administer and to the State of California by July 1, 1989, and July 1, 1990, respectively, in violation of EPCRA § 313 and 40 CFR Part 372. Count III alleged that Catalina "processed" quantities of styrene in excess of the established threshold of 50,000 pounds during the calendar year 1988, and Counts IV through VII alleged that Catalina "processed" quantities of styrene in excess of the established threshold of 25,000 pounds during the calendar years 1989 through 1992 and failed to submit Form Rs to the Administrator and to the State of California by July 1 of the following year in violation of EPCRA § 313 and 40 CFR Part 372. For these alleged violations, it was proposed to assess Catalina a penalty totaling $175,000.

Under date of July 14, 1994, Catalina answered, admitting that it used acetone as a cleaning agent in its manufacturing operations, but asserted that it was reviewing its records and

unable to respond to the remaining allegations in Counts I and II [concerning quantities of acetone used] and failure to submit Form Rs as alleged. The remaining allegations of these counts were therefore denied. Catalina also admitted that it processed products containing styrene during the calendar years 1988 through 1992, but asserted that it was reviewing its records and unable to respond to the remaining allegations in Counts III through VII [concerning quantities of styrene processed] and failure to submit Form Rs as alleged. The remaining allegations of these counts were therefore denied. Catalina requested a hearing to contest the alleged violations and the proposed penalties.

The parties have exchanged prehearing information in accordance with an order of the ALJ. On October 12, 1994, Complainant filed a motion for an accelerated decision as to liability, asserting that no issues of material fact existed as to the violations of EPCRA alleged in the complaint and that Complainant was entitled to a decision in its favor as a matter of law. Opposing the motion, Catalina filed an "Opposition to Complainant's Motion for an Accelerated Decision and [a Renewed] Request for Hearing" on October 19, 1994 (Opposition). Among other things, Catalina alleged that it was a small, family owned corporation which designed and manufactured moderately priced sailboats, that its plant is located at 21200 Victory Boulevard,

Woodland Hills, California, and that it has approximately 255 employees.[1/]

Catalina acknowledged that it used resins containing styrene to construct various boat parts and that in each year from 1988 to 1992 it used resins containing more than 25,000 pounds of styrene. Catalina also acknowledged using more that 10,000 pounds of acetone to clean boat parts in each of the calendar years 1988 and 1989. Additionally, Catalina admitted that it did not file SARA § 313 Form R reports for its use of acetone in 1988 and 1989 and for its use [processing] of styrene in the years 1988 through 1992 (Opposition at 2). Catalina alleged, however, that it had filed numerous reports with government agencies on its use of resins containing styrene and its use of acetone as well as its emissions during the period 1988-1993 (Id). Moreover, Catalina asserted that it had reached out to the public to inform the community about its operations and air emissions. According to Catalina, its operations and emissions were also discussed at Chamber of Commerce meetings (Opposition at 3).

Catalina alleged that it was not aware of EPCRA § 313 reporting requirements until it was visited by an EPA inspector in late 1993, that it fully cooperated with the inspector and timely filed Form R reports for styrene and acetone for the years 1988-

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[1/] For these and other statements in opposition to Complainant's motion for accelerated decision, Catalina relies on the declaration of Mr. Gerald, sometimes referred to as Gerard, Douglas, identified simply as an employee of Catalina. Mr. Douglas testified at the hearing and identified himself as vice president and chief of engineering.

1992 after it became aware of the reporting program. Catalina averred that during settlement negotiations Agency representatives stated that they were required to strictly follow the "Enforcement Response Policy for Section 313 of the Emergency Planning and Community Right-To-Know Act (1986) and Section 6607 of the Pollution Prevention Act (1990) ("ERP"). Despite their alleged acknowledgement that Catalina was cooperative and timely acted to file past due Form R reports, Catalina says that it was informed by Agency personnel that they had no authority to reduce the penalty by more that the 30 percent provided by the ERP (Opposition at 4). Inasmuch as the ERP was not promulgated by notice and comment rulemaking in accordance with the Administrative Procedure Act, Catalina argued in effect that rigid adherence to the ERP is not lawful and that the ERP need not be followed.

By an order, dated January 10, 1995, Complainant's motion for an accelerated decision as to liability was granted and its motion for an order striking that part of Catalina's opposition to the motion which referred to settlement negotiations was denied.[2/]

A hearing on this matter was held in San Francisco, California on January 28, 1997.

[2/] The order pointed out that, although statements of Complainant's representatives during settlement negotiations were not admissible, statements with respect to whether the ERP was regarded as binding may be "otherwise discoverable" within the meaning of Federal Evidence Rule 408. Rule 408 is specifically referred to in Section 22.22(a) of the applicable Rules of Practice and the existence of this exception was held to be a sufficient reason for denying the motion to strike.

Based on the entire record including the briefs and proposed findings of the parties, I make the following

FINDINGS OF FACT

1. Respondent, Catalina Yachts, Inc., is a California corporation and a "person" as defined by Section 329(7) of EPCRA [42 U.S.C. § 11049(7)].
2. Catalina is an owner and operator of a "facility" as defined by Section 329(4) of EPCRA, which facility is located at 21200 Victory Boulevard, Woodland Hills, CA 91364. Catalina manufactures recreational sailboats, sometimes referred to as "family" sailboats, from eight-foot "dinghies" to 30-foot cruising boats (Tr. 80).
3. The Facility has 10 or more "full-time employees" as defined at 40 CFR § 372.3 and is classified in Standard Industrial Classification (SIC) Code 3732-Boat and Boat Building.
4. EPCRA § 313(f) "Threshold for reporting" and 40 CFR § 372.25 provide that for the purposes of reporting toxic chemicals "used" at a facility the threshold is 10,000 pounds of toxic chemical per year and that for toxic chemicals manufactured or "processed" at a facility the threshold is 75,000 pounds for the calendar year 1987, 50,000 pounds for the calendar year

1988, and 25,000 pounds for the calendar year 1989 and each year thereafter.[3/]

5. A memorandum attached to an inspection report, which in turn is attached to the Verified Statement of Pi-Yun "Pam" Tsai, dated January 22, 1997 (C's Exh A), reflects that Catalina used 368,168 pounds of acetone during the calendar year 1988, 101,665 pounds during the calendar year 1989, only a 1,089 pounds in 1990, 321 pounds in 1991 and 1,802 pounds in 1993. The memorandum further reflects that Catalina processed 1,784,078 pounds of styrene in calendar year 1988, 2,691,348 pounds of styrene in the calendar year 1989, 898,416 pounds of styrene in calendar year 1990, 624,441 pounds of styrene in calendar year 1991 and that it processed 660,778 pounds of styrene in calendar year 1992. These figures are based on data reportedly supplied by Catalina or its environmental consultant and include estimates of the percentage of styrene in the various resins used by Catalina. There is no evidence to the contrary and these figures are accepted as accurate.

[3/] The basic demarcation between processing and use is that processing is an incorporative activity, i.e., incorporating a toxic chemical into an article prior to its distribution in commerce or the preparation of an article containing a toxic chemical for distribution in commerce, while "otherwise use" is a non-incorporative activity meaning that the chemical is not intended to become part of a product distributed in commerce. See EPCRA § 313 (b)(1)(C), defining "process"; the regulatory definition of process at 40 CFR § 372.3, and the preamble to the final Part 372-Toxic Chemical Reporting; Community Right-To-Know rule, 53 Fed. Reg. 4500, 4525 (February 16, 1988) at 4506.

6. Specific listings of toxic chemicals reportable under EPCRA § 313 are contained in 40 CFR § 372.65 (1992). Both acetone, CAS No. 67-64-1 and styrene, CAS No. 100-42-5, are included in the list. Acetone was, however, proposed for delisting (59 Fed. Reg. 49888, September 30, 1994) and delisted effective June 16, 1995 (60 Fed. Reg. 31643, June 16, 1995).

7. The quantities of acetone used by Catalina during the calendar years 1988 and 1989 (finding 5) exceed by manyfold the 10,000-pound per calendar year threshold for reporting use of toxic chemicals set forth in EPCRA § 313(f) and 40 CFR 372.25. The quantities of styrene processed by Catalina during the calendar years 1988 through 1992 (finding 5) exceed by manyfold the 50,000-pound per calendar year threshold for reporting toxic chemicals processed in calendar year 1988 and the 25,000-pound threshold applicable for reporting toxic chemicals processed for the calendar year 1989 and subsequent years (EPCRA § 313(f) and 40 CFR § 372.25). Catalina did not submit toxic chemical inventory release forms (Form Rs) reporting the use of acetone during the calendar years 1988 and 1989 to the Administrator and to the State of California by July 1, 1989 and July 1,1990, respectively. Likewise, Catalina did not submit toxic chemical inventory release forms reporting the processing of styrene during the calendar years 1988 through 1992 to the Administrator and to the State of California by July 1, 1989, and by July 1 of each of the years 1990 through 1993.

8. On November 15, 1993, Catalina's facility was inspected by Mr. Bill Deviny, Toxic Reporting Inventory (TRI) program specialist, EPA Region IX (Verified Statement of Pi-Yun "Pam" Tsai, dated January 22, 1997, ¶ 6; Inspection Report, prepared May 26, 1994, Exh 2 to Ms. Tsai's statement). According to the inspection report, the EPCRA Tracking System (ETS) had been requested to identify all companies in Zip Codes 91300 to 91399 (Los Angeles area) having 50 or more employees and Catalina was selected for inspection because it was in SIC code 3732-Boat and boat building and "right around the corner" from another company Mr. Deviny planned to inspect.[4/] Mr. Deviny met with Mr. Gerald Douglas, identified note 1 supra, who reportedly stated that Catalina manufactures sail boats ranging in size from approximately 12 feet to 42 feet and that the boats were all fibreglass reinforced plastic. Mr. Douglas reportedly stated that he was not familiar with the [reporting] requirements of EPCRA.

9. Mr. Deviny again visited Catalina's facility on May 19, 1994 (Inspection Report). Apparently, Catalina had sent a letter on April 27, 1994 (not in evidence), which the inspection report states represented emissions of acetone and styrene rather than usage of these chemicals. In consultation with Mr. Douglas and Catalina's environmental consultant, Mr. David Wright, who was reached over the phone, it was determined that

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[4/] Mr. Deviny did not appear as a witness at the hearing.

emissions of acetone essentially equalled usage. In further consultations, the quantities of acetone used by Catalina during the calendar years 1988 through 1992 and the quantities of styrene processed during the years 1988 through 1992 were developed and set forth in a memorandum, dated June 1, 1994, attached to the inspection report. This is the memorandum upon which the figures in finding 5 are based. Catalina submitted the Form Rs in May 1994 (Tr. 39) at a date not precisely determinable from the record. For the purposes of this decision, it will be assumed the Form Rs were mailed on May 20, 1994, the day following Mr. Deviny's second visit to Catalina's facility.

10. Ms. Tsai testified that she first became aware of Catalina upon reviewing Mr. Deviny's inspection report (Verified Statement, ¶ 6). She checked the TRI System (TRIS), which is a computer accessible data base, for Woodland Hills, California and learned that Catalina had failed to submit Form Rs showing acetone usage during the [calendar] years 1988 and 1989 and had failed to submit Form Rs showing quantities of styrene [processed] during the calendar years 1988 through 1992 (Id. ¶ 8).

11. Ms. Tsai drafted the complaint and calculated the proposed penalty using the Enforcement Response Policy for Section 313 of EPCRA and Section 6607 of the Pollution Prevention Act (ERP) (August 10, 1992). The ERP contains a penalty matrix having "Extent Levels" A, B, and C on the horizontal axis and

six "Circumstance Levels" on the vertical axis (ERP at 11). The ERP provides that the extent level of a violation is based upon the quantity of the EPCRA § 313 chemical manufactured, processed, or otherwise used by the facility; the size of the facility based on a combination of the number of employees at the violating facility and the gross sales of the violating facility's total corporate entity (Id. 8). Facilities which manufacture, process, or otherwise use more that ten times the threshold of the EPCRA § 313 chemical involved in the violation and which have $10 million or more in total corporate entity sales and fifty or more employees are in Extent Level A (ERP at 9). The circumstance levels of the penalty matrix take into account the seriousness of the violation as it relates to the accuracy and availability of the information to the community, to the states and to the federal government. The ERP provides that failure to report in a timely manner is a circumstance Level 1 violation (ERP at 12).

12. Based on the amount of chemical involved in the violations alleged in the complaint and the size of Catalina's business, Ms. Tsai determined that the extent level for each violation was Level A (Verified Statement, ¶ 10; Penalty Calculation Worksheet, Verified Statement, Exh 3). Data on Catalina's sales and the number of its employees were taken from an EPCRA Targeting System, Facility Detail Report, dated November 10, 1993 (Verified Statement, Exh 4). This document indicates that

Catalina had $40 million in gross sales (year not stated) and 275 employees. The circumstance level for each violation was determined to be Level 1, failure to report in a timely manner. These determinations resulted in the maximum single day penalty of $25,000 provided by EPCRA § 325(c)(1) for each of the seven violations alleged in the complaint for a total of $175,000. Ms. Tsai determined that none of the ERP adjustment factors, e.g., voluntary disclosure, history of prior violations, and delisting of chemicals involved in the violations, were applicable. She pointed out that by Region IX practice the adjustments for "attitude" and "other factors as justice may require" were limited to settlement negotiations.[5/]

13. The ERP provides that for chemicals delisted before or during the pendency of an enforcement action the Agency may settle cases involving such chemicals on terms providing for a 25% reduction in the penalty otherwise calculated (Id. 17, 18). Because acetone has been finally delisted (finding 6), Complainant says it is prepared to reduce the penalty claimed to $162,500 (Tr. 34, 35, 44).

14. Ms. Tsai described the purpose of Form R as the reporting to EPA and the state, on an annual basis, the quantity of an EPCRA listed chemical released to all environmental media, i.e., air, land, or water, by the reporting facility (Verified

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[5/] Verified Statement ¶ 12. This represents the corrected paragraph number as some paragraphs in the original verified statement were duplicately numbered.

Statement, ¶ 19). She stated that the Form R was also used to report the maximum amount of an EPCRA listed chemical on site at any one time during the calendar year (Id.) She pointed out that the filing of Form R permitted public access to the information at a reasonably localized level. She emphasized that Catalina's failure to complete and submit Form Rs in a timely manner prevented federal, state and local governments, as well as the people of the communities surrounding the facility, from knowing of the toxic chemicals used and released by the facility.

15. Ms. Tsai explained that the first EPCRA reporting year was 1987 and that the first Form Rs were to be submitted by July 1, 1988 (Verified Statement ¶ 20). She pointed out that the regulated community was notified of their EPCRA obligations through EPA rulemaking and that, in addition, EPA and Region IX conducted numerous workshops at which EPCRA requirements were explained (Id.). She asserted that numerous workshops were conducted in Southern California and that Catalina was on at least two of the databases used to notify the regulated public of workshop schedules.

16. Under cross-examination, Ms. Tsai acknowledged that neither her statement nor the penalty calculation worksheet specifically referred to the penalty factors set forth in EPCRA (Tr. 11, 12). She maintained, however, that these factors had been considered by reference to the ERP, but were determined to be not applicable (Tr. 13, 31-33). Consequently,

no adjustments to the penalty initially calculated (Extent Level A, Circumstances Level 1) were made.[6/] Concerning "history of prior such violations", she testified that this factor could only be considered as an upward adjustment in the penalty (Tr. 33, 36). This is in accordance with the ERP which provides, inter alia, that the penalty matrix is intended to apply to first offenders (Id. 16).

17. Ms. Tsai testified that "the degree of culpability" could also only be considered to adjust the penalty upward (Tr. 36). She was apparently unaware that this factor could be regarded as included in the ERP under "attitude". She acknowledged that attitude had two components "cooperation and compliance" and that the ERP provides for an adjustment of up to 15% for each of these components (Tr. 38). She stated, however, that it was Region IX's policy not to follow the ERP in this regard when the penalty was [initially] calculated (Tr. 39). She acknowledged that Catalina was cooperative during the inspection and afterwards. Even though Form Rs for the years in question had been submitted prior to the filing of the complaint, she excused the failure to make any adjustment for compliance by the assertion " the [A]gency was not sure if the company was going to come [in]to compliance." (Tr. 39) Asked

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[6/] Ms. Tsai testified that the economic benefits or savings from the violations were not considered (Tr. 34). The ERP does not mention this factor which supports the conclusion infra that § 313 violations are considered to be Class II penalties for which, in accordance with EPCRA § 325(b)(2), the penalty factors in TSCA § 16 are applicable.

whether Region IX considered the [final statutory factor] "other factors as justice may require" in this instance, Ms. Tsai replied in the negative (Tr. 36). Summarizing Complainant's position, she stated that the only adjustment to the penalty claimed they were prepared to make was 25% in recognition of the fact acetone had been delisted (Tr. 44, 45). All other adjustment factors were considered to be not relevant.

18. Ms. Tsai testified that after the instant complaint was filed, Catalina made the Agency aware that it had filed certain forms and information with the Los Angeles Fire Department and the South Coast Air Quality Management District (SCAQMD). Ms. Tsai maintained, however, that the content of the forms submitted to the Fire Department and to the SCAQMD were not the same as the forms required by EPCRA § 313 (Tr.17, 18). Additionally, she opined that the information in the mentioned forms was not as accessible or available [to the public] as information required by EPCRA § 313. Ms. Tsai explained that TRI information is complied in a national computer database which is accessible by any citizen via the Internet (Tr. 42). She asserted that the information was available through the National Library of Medicine database, on CD ROMS which are distributed to federal depository and university libraries, and in EPA annual reports. According to Ms. Tsai, any person may also obtain the information by making a request to EPA (Tr. 43).

19. Catalina's Exhibit R-3 is a copy of a letter from Catalina to the Los Angeles City Fire Department, dated February 20, 1989, enclosing what is stated to be Catalina's Hazardous Materials Business Plan. Ms. Tsai stated that she was unaware of the frequency this information was submitted to the fire department and acknowledged that she did not investigate the matter in any way (Tr. 20). The mentioned exhibit includes the first page of the plan (BP-1) and three inventory sheets. The inventory sheets indicate the maximum quantities of various chemicals on hand at any one time and the total yearly quantity [used] apparently for the year 1988. Styrene is listed as comprising 33% of Polyester Gelcoat, yearly quantity of 1.5 million pounds, 99.6% of Styrene Monomer, yearly quantity of 1,000 gallons and 20% to 62% of Resin, Polyester Unsaturated, yearly quantity of 3.5 million pounds.

20. An inventory sheet referred to in the previous finding states that the maximum quantity of acetone on hand at any one time is 4,000 gallons and that the total yearly quantity is 24,000 gallons. Additionally, total waste acetone is stated to be 30,000 gallons of which 80% is acetone. These figures represent approximately 51% of the amount of acetone in pounds shown as used in 1988 in the inspection report (finding 5). Additionally, Mr. Douglas testified that Catalina used 40,000 gallons of acetone annually (Tr. 105, 106). He subsequently testified that Catalina used 420,000 gallons of acetone in 1988 of which 277,000 gallons were emitted into the

air (Tr. 109). It is concluded that Mr. Douglas' testimony that Catalina used 40,000 gallons of acetone annually was intended as a rough approximation, meaning 40,000 gallons plus; that the 420,000-gallon figure for acetone used was intended to be 42,000 gallons and that the 277,000-gallon figure for acetone emitted was intended to represent pounds.[7/]

21. Exhibit R-4 consists of forms submitted by Catalina to the SCAQMD reporting emissions for the year 1988. Form B-3 indicates that 4,669.2 gallons of acetone were used in spray booths for cleaning equipment which times the emission factor (weight) of 6.6 equalled emissions totaling 30,816.72 pounds. This form also indicates that 42,022.8 gallons of acetone were used for purposes other than cleaning equipment, which times the emission factor of 6.6 equalled emissions totaling 277,350.8 pounds. The forms also report usage in pounds of polyester gel coat and polyester resin used in permitted spray booths and the usage in pounds of polyester resin not used for permitted equipment. Emission factors are applied to these figures resulting in the reporting of total organic gas emissions in pounds. The percentage of styrene in the gel coat and polyester resin is not stated and the form does not reflect styrene usage or emissions. Ms. Tsai understood that

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[7/] Mr. Douglas testified that a gallon of acetone weighs approximately seven pounds (Tr. 106) and a handwritten note on the inventory indicates that the weight of a gallon of acetone is 6.6 pounds. In documents submitted to the SCAQMD, Catalina indicated that 6.6 was the emission factor.

these forms were required to be submitted to SCAQMD annually (Tr. 22).

22. R's Exhibit 5 is a copy of a letter, dated October 31, 1991, from EMCON, Catalina's environmental consultant, to the SCAQMD enclosing a copy of what is stated to be an Air Toxics Inventory Report (AITR) for Catalina. Included with the report is a Facility Emission Summary Form, showing maximum hourly and yearly average emissions for various chemicals including styrene. Maximum styrene emissions are shown as 14.711 pounds per hour and average yearly styrene emissions are shown as totaling 61,444.2 pounds. Styrene emissions from Gel Coat Operations and Resin Applications are also shown on Attachment 4 to the AITR, Emission Estimate Calculations. Ms. Tsai stated that she was familiar with AITRs (Tr. 24). She asserted that AITRs were available to the public, but not in the same manner as Section 313 information (Tr. 28).

23. Mr. Gerald B. Douglas, previously identified as vice president, was Catalina's sole witness. He testified that his daily responsibilities were as chief of engineering (Tr. 79). He stated that at one time he was solely responsible for Catalina's environmental compliance, but that Catalina had since employed an environmental consultant and that he (Douglas) was responsible for overseeing the consultant's work. He testified that Catalina was founded in 1969 and that he had been an employee of Catalina for over 20 years (Tr. 80). Catalina had 225 or 230 employees at its Woodland Hills'

facility in 1993. In 1985 Catalina purchased a company known as Morgan Yachts from Beatrice Foods in order to have an East Coast manufacturing facility for its Catalina line of sail boats (Tr. 80). This facility is located in Largo, Florida and had approximately 130 employees at the time of the hearing.

24. In November of 1993, Catalina was visited (inspected) by Mr. Bill Deviny of EPA (Tr. 81). Mr. Douglas testified that this was the first time that Catalina had ever been visited by EPA. Additionally, he denied ever having received any correspondence with EPA [prior to the instant proceeding]. He explained that Catalina reported air emissions to the SCAQMD, and also reported inventories of materials used to build boats, basically polyester resin and gel coats, and acetone, a solvent used for cleanup (Tr. 81, 82). He testified that these materials were also reported to the Hazardous Materials Division of the County of Los Angeles, which was administered by the fire department. Reports to the fire department included reporting the presence of acetone and styrene (Tr. 83, 84). Mr. Douglas stated that reports to the SCAQMD were filed once a year. He pointed out, however, that there were two years when the reports were filed twice a year, because SCAQMD was changing its accounting system. He identified R's Exhibits 3, 4, and 5 as the type of reports to SCAQMD and the fire department to which he was referring (Tr. 85).

25. Mr. Douglas testified that Catalina also performed what he referred to as "Hot Spot Reporting" [to SCAQMD]. These reports

were formerly submitted once a year, but presently are submitted once every two years (Tr. 83). He noted, however, that the frequency of reporting was discretionary with SCAQMD. He further testified that SCAQMD performed random inspections, which worked out to be once a month, for the purpose of verifying the accuracy of materials reported as being used and that records were being properly maintained. He averred that although Catalina had been audited twice, it had never had a reporting obligation violation (Tr. 83, 97). It is noted, however, that there is no evidence in the record of any violations whatsoever by Catalina.

26. Mr. Douglas testified that Catalina did not file Form Rs for styrene and acetone for the years identified in the complaint, because he simply did not know about the requirement (Tr. 120). He stated that he had attended workshops sponsored by SCAQMD, but denied ever attending or being aware of EPA workshops (Tr. 124). He testified that after he heard from Deviny, he called the individual, Mr. Purcell Beattie, responsible for environmental matters in Catalina's Morgan Division in Largo, Florida and learned that the Morgan Division had been filing Form Rs with EPA as a matter of course (Tr. 88, 89). This is confirmed by the Certified Statement of Linda A. Travers, Director of EPA's Information Management Division, dated June 28, 1996 (Verified Statement of Ms. Tsai, Exh 5). Ms. Travers' statement shows that Catalina Yachts/Morgan Division, Largo, Florida submitted EPA

Forms 9350-1 (Form Rs) for acetone in the years 1990, 1991, and 1992; for styrene in the years 1990 through 1995, and for toluene in the years 1994 and 1995.

27. Concerning EPA's relationship with the State of California, Mr. Douglas explained that prior to 1993 he understood that EPA wrote certain regulations and then charged state and local agencies, the SCAQMD in this instance, with enforcement of those regulations (Tr. 86, 87, 124). He understood that in Florida, the EPA, through the Florida EPA, directly administered environmental regulations in Pinellis County, in which the Morgan Division was located (Tr. 87, 88, 123). He testified that neither he nor Mr. Beattie understood that the requirement to file Form Rs was a national or federal requirement (Tr. 89, 90)

28. Mr. Douglas testified that after Mr. Deviny's visit on November 15, 1993, he immediately retained Mr. David Wright, formerly employed by EMCON, to assist in the filing of Form Rs (Tr. 91). He explained that this involved research of several chemicals going back several years and that even though [several of] these chemicals were below thresholds, the chemicals still had to be identified. He asserted that this involved more than simply transposing information from reports to the SCAQMD and "quite a bit" of work to demonstrate that these other chemicals were below thresholds. The upshot was that the Form Rs had not been completed at the time of the Northridge, California earthquake on January 17, 1994 (Tr. 91,

92). Couplers supporting overhead water mains had broken [during the quake] and fallen onto crane rails, which arced and caused a fire when the power unexpectedly came back on (Tr. 93). The fire occurred within 48 hours of the earthquake. Because of the quake and the fire, Catalina's plant was essentially shut down for a four-month period. Catalina submitted (mailed) the Form Rs in May 1994 (Tr. 39), at a date not precisely determinable from the record. This date will be assumed to be May 20, 1994, the day following Mr. Deviny's second inspection.[8/]

29. Mr. Douglas denied that Catalina obtained any economic benefits or savings from the failure to [timely] submit Form Rs (Tr. 97). He explained that Mr. David Wright, identified finding 9, had been employed to assist in filing reports to the SCAQMD which had become increasingly complex and he estimated that the Form Rs could have been completed and submitted at the time for an additional $150 to $200 (Tr. 98, 99). This apparently is the per annum cost. As indicated infra, in accordance with EPCRA § 325(b)(2) the factors set forth in TSCA § 16(a)(2)(B) are for consideration in determining penalties for violations of EPCRA § 313. TSCA § 16(a)(2)(B) does not include "economic benefit or savings resulting from the violation" as a penalty determination

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[8/] Mr. Deviny's second inspection was on May 19, 1994. As indicated (finding 9), Catalina had submitted a letter on April 27, 1994, stating acetone and styrene emissions which allegedly were the same as quantities used.

factor. Nevertheless, economic benefit or savings resulting from a violation could properly be considered in penalty determination under "such other matters as justice may require."

30. Mr. Douglas described Catalina's efforts at "outreach", i.e., keeping people of the surrounding community informed of its operations and of materials used (Tr. 99-101). The first part of the program was to readily respond to inquiries and to offer tours of the plant to interested persons. He pointed out that the plant had four stacks each 132 feet in height, which were not related to combustion, but were for the purpose of dissipating odors from the use of styrene. He indicated that existence of the stacks resulted in many inquiries. Secondly, beginning in 1986 Catalina had scheduled weekly tours of the plant at 4 o'clock every Thursday during which time the operations of the plant and materials used were explained, and questions of tour participants answered (Tr.101-02). The schedule for the tours was advertised by a sign in the window, in local newspapers, in the company magazine and through the distribution of fliers (Tr.102-03). In 1991, Catalina conducted a two-day open-house at which various boat models were displayed, its operations and materials used explained and refreshments were served (Tr. 103-04). Mr. Douglas estimated that approximately 2,000 people attended. Under cross-examination, he acknowledged that some tour participants

were boat owners and that the tours could be good for business (Tr. 129).

31. Mr. Douglas described Catalina's voluntary efforts to reduce hazardous chemical use and emissions (Tr. 104). He testified that beginning in 1991 Catalina undertook to reduce or eliminate the use of acetone, which is used for cleaning purposes, and replace it with DBE, a product made by Dow Chemical and Dupont, which has very low emissions (Tr. 104-05). He asserted that Catalina now used less than 50 gallons of acetone weekly as opposed to the 40,000 plus gallons formerly used annually. In further testimony, he pointed out that acetone constituted two-thirds of VOC emissions and that eliminating the use of acetone [or practically so] reduced VOC emissions by two-thirds (Tr. 109-10). He pointed out that converting to the use of DBE involved the installation of a still and heated tanks and obtaining permission [permits] from SCAQMD (Tr. 105). The conversion was completed by 1993.

32. Mr. Douglas estimated the cost of installing the still as $30,000 and because DBE was not as efficient as acetone, he estimated additional annual operating costs of $12,000 to $14,000 and additional labor costs of $35,000 to $40,000 annually (Tr. 110, 111). Exhibit R-6 is a letter to Catalina, dated September 28, 1994, from Mr. Richard Pepiak, identified as a sales representative of a firm known as M.A.HANNA RESIN

Distribution.[9/] In the letter, Mr. Pepiak commends Catalina for its decision to voluntarily replace acetone with DBE some four years ago. The letter states that Catalina has reduced emissions by an estimated seventy-five percent and emphasizes the commitment of time, training and substantial financial resources necessary to achieve this result. The letter further states that Catalina's success in this regard has given "us" the ability to promote DBE as a solvent alternative throughout Southern California, points our that many fabricators have since made the conversion with similar reductions in emissions and that others were now testing DBE as a viable alternative.

33. Describing other efforts by Catalina to reduce the use and volume of hazardous chemicals and emissions, Mr. Douglas stated that Catalina stopped using anti-fouling bottom paint on the boats it manufactured.[10/] He explained that previously the use of such paints had been offered to customers as an option for which Catalina made an appropriate charge and markup. He testified that Catalina painted the last boat bottom [with anti-fouling paint] in 1994 and estimated the lost profit from markups for such painting at $28,000 to $30,000 a year (Tr. 114). Under cross-examination, he

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[9/] Mr. Pepiak's verified statement was not admitted into evidence, because he was not available for cross-examination.

[10/] Tr. 113-14. Mr. Douglas did not identify the anti-foulant paint used. Presumably, paints used were certified by the Administrator pursuant to the Organotin Antifouling Paint Control Act of 1988, 33 U.S.C. § 2401 et seq.

acknowledged that some of the chemicals in the anti-fouling paints were EPCRA-listed chemicals, but asserted that they had determined that none met the threshold [reporting] levels (Tr. 131).

34. Another initiative described by Mr. Douglas involving a reduction in emissions was the application of a brushable gel coat to the outside surface of boats rather than applying such materials with spray equipment which resulted in high styrene (VOC) emissions (Tr. 114-16). He indicated that the practice of brushing of the gel coat was fully on line since November [of 1995] (Tr. 115). He estimated that this change would reduce annual styrene emissions by 15% to 20%. He pointed out, however, that brushing was more labor intensive and would increase costs by an estimated $16,000 to $22,000 a year (Tr. 116). He gave three essential reasons for these environmentally friendly initiatives: 1) to create a good work environment for its employees; 2) to reduce VOCs and thus odors; and 3) it was good PR, because many of Catalina's customers were extremely sensitive to environmental issues which was one reason they bought sailboats rather than motor boats (Tr. 118-19).

35. Catalina's ability to pay the proposed penalty is not in issue. Catalina objected to a discovery order entered by the ALJ requiring it to furnish copies of its income tax returns upon the ground that it was not raising ability to pay as a defense to the proposed penalty. Order Rescinding Discovery

Order (April 1, 1996). Thus, Catalina has expressly waived this defense.

CONCLUSIONS

1. Respondent, Catalina Yachts, Inc., is a California Corporation, and thus a person as defined in EPCRA § 329(7).
2. At all times relevant to the complaint herein, Catalina was in SIC code 3732, Boat and Boat Building, and had ten or more full-time employees. Catalina is therefore subject to the reporting requirements of EPCRA § 313.
3. During the calendar years 1988 and 1989 Catalina otherwise used quantities of acetone in excess of the threshold quantity of 10,000 pounds set forth in EPCRA § 313(f) and 40 CFR § 372.25. At that time, acetone was on the list of toxic chemicals required to be reported set forth in 40 CFR § 372.65.
4. Catalina was therefore required but failed to submit Form Rs showing acetone usage and emissions for the calendar years 1988 and 1989 to the Administrator and the State of California by July 1, 1989, and July 1, 1990, respectively. EPCRA § 313(a) and 40 CFR § 372.30.
5. During the calendar year 1988 Catalina processed quantities of styrene in excess of the 50,000-pound threshold set forth in EPCRA § 313(f) and 40 CFR § 372.25 and during the calendar years 1989 through 1992 Catalina processed quantities of styrene in excess of the 25,000-pound threshold set forth in

EPCRA § 313(f) and 40 CFR § 372.25. Styrene was and is on the list of toxic chemicals required to be reported set forth in 40 CFR § 372.65.

6. Catalina was therefore required but failed to submit Form Rs showing, inter alia, the quantities of styrene processed during the calendar years 1988 through 1992 to the Administrator and the State of California by July 1 of the years 1989 through 1993.

7. EPCRA § 325(c) provides for a penalty of up to $25,000 for each violation of EPCRA §§ 312 or 313. An appropriate penalty for the violations of EPCRA § 313 found herein is the sum of $39,792.

DISCUSSION

Complainant purports to have calculated the penalty initially claimed, $175,000 for the seven violations of EPCRA § 313 alleged in the complainant, in accordance with the ERP (August 10, 1992). Other than a willingness to reduce the penalty for the acetone violations by 25% reduction to account for the fact that acetone has been delisted, however, Complainant insists on the maximum penalty of $25,000 for a single violation specified in EPCRA § 325(c) for a total of $162,500 (Post-Hearing Brief at 12, 13, 57; Complainant's Response to Respondent's Opening Brief at 27, 31). Moreover, although asserting that all statutory factors relating to the violation and to the violator were properly considered

(Response at 20, 29), Complainant excuses its failure to make any adjustment for the attitude factors of cooperation and compliance as provided in the ERP, by referring to its practice of considering such factors only in settlement negotiations.[11/] This position is simply arbitrary as Complainant, having elected to determine the penalty in accordance with the ERP, may not "pick and choose" the provisions of the ERP with which it will comply.

As indicated (finding 12), the "extent level" for the violations at issue was determined to be "Level A", because the amounts of the chemicals involved were more that ten times the applicable thresholds, Catalina's annual sales exceed $10 million, and it had fifty or more employees. The circumstance levels of the seven violations were determined to be "Level 1", failure to report in a timely manner. The ERP provides, however, that Category I violations are those where the Form R was submitted one year or more after the July 1 due date and that Category II violations are those submitted less than one year after the due date (supra note

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[11/] Response at 28. EPCRA § 325(c) does not set forth factors to be considered in determining penalties and does not expressly refer to or incorporate the penalty factors set forth in EPCRA §§ 325(b)(1)(C) for determining Class I penalties or 325(b)(2) for determining Class II penalties. Complainant, however, contends that the appropriate statutory factors in determining penalties for violations of § 313 are those set forth in the Toxic Substances Control Act, 15 U.S.C. § 2615, in accordance with EPCRA § 325(b)(2), which provides in pertinent part:" Any civil penalty under this subsection shall be assessed and collected in the same manner, and subject to the same provisions, as in the case of civil penalties assessed and collected under section 2615 of Title 15." Inasmuch as Class II penalties may include multiple or per day penalties, which are permitted by EPCRA § 325(c)(3), this position is considered to be reasonable and is accepted.

6). Inasmuch as Count VII, concerning the Form R for styrene processed during the calendar year 1992 was due by July 1, 1993, and was submitted on May 20, 1994, 324 days late (finding 28), this was a Category II violation for which the penalty should have been computed on a per day basis. This is another instance of Complainant refusing to follow or ignoring the ERP where it results in a reduction of the penalty however slight.

Applying the per day formula set forth in the ERP at 14 under which all Category II violations are considered to be Level 4 on the penalty matrix, the gravity based penalty for Count VII is determined as follows:

$$\$10,000 + \frac{(324-1) \times \$15,000}{365} = \$23,274$$

The total gravity based penalty is thus $173,274.

Catalina emphasizes that EPCRA § 325(c) does not mandate that the maximum penalty of $25,000 per violation be assessed and argues, inter alia, that the "nature and circumstances" of the violation compel a substantial reduction in the proposed penalty (Opening Brief at 1, 2, 14, 15; Reply Brief at 7-9, 12). I conclude, however, that prima facie the ERP provides a reasonable basis for determining the gravity based penalty with the adjustment noted for Count VII. The matters at issue thus turn on application of the adjustment factors with respect to the violator set forth in

TSCA § 16.[12/] As noted above (finding 35), "ability to pay" and "effect on ability to continue to do business", which are sometimes considered as one factor, have been waived as defenses by Catalina and are not at issue.

The ERP states that "(t)he Agency intends to pursue a policy of strict liability as to violations, therefore, no reduction is allowed for culpability." Id. 14. The ERP further states that lack of knowledge does not reduce culpability since the Agency has no intention of encouraging ignorance of EPCRA and its requirements and because the statute only requires facilities to report information which is readily available. The policies expressed in these statements are unexceptionable. As noted infra in connection with the discussion of "any history of prior such violations", however, such facts are part of the totality of circumstances" with respect to the violator" and for consideration as mitigation of an otherwise harsh penalty.

In this regard, Complainant relies on Ms. Tsai's testimony that Catalina was on two of the databases used to notify affected firms of workshop schedules at which EPCRA requirements were explained (finding 15), as evidence that Catalina should have known of EPCRA requirements (Response at 10, 11). Mr. Douglas, however, denied

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[12/] TSCA § 16(a)(2)(B), 15 U.S.C. § 2615(a)(2)(B), provides: In determining the amount of a civil penalty, the Administrator shall take into account the nature, circumstances, extent and gravity of the violation or violations, and, with respect to the violator, ability to pay, effect on ability to continue to do business, any history of prior such violations, the degree of culpability, and such other matters as justice may require.

ever receiving any correspondence or visits from EPA prior to Mr. Deviny's inspection on November 15, 1993, and Ms. Tsai's vague reference to unidentified databases without an explanation of how the databases were used or the mailing practices based thereon do not establish the contrary.[13/]

In addition to the foregoing, the ERP lists voluntary disclosure, history of prior violations, delisted chemicals, attitude, and "other factors as justice may require" as factors to be considered in determining whether to adjust the gravity based penalty (ERP at 14-19). Catalina was unaware of the EPCRA § 313 reporting requirement and there could be no voluntary disclosure. It is worthy of note, however, that Catalina had a lot of company in this respect at the inception of the § 313 reporting requirement. See Spang & Company, EPCRA Appeal Nos. 94-3 & 94-4 (EAB, October 20, 1995), for a discussion of the Agency's notice of noncompliance (NON) program in lieu of penalties.

The ERP states that the penalty matrix is intended to apply to "first offenders" and thus implies that the absence of prior EPCRA

[13/] Complainant has attached to its post-hearing brief a copy of letters from Catalina's counsel, dated March 14 and March 22, 1995, which request proof of the Agency's outreach program with specific reference to Catalina, if such exists. The reply from Complainant's counsel, dated March 29, 1995, enclosed a copy of two sheets bearing Catalina's name and address which purportedly constitute the information requested. These papers are, however, identified only by handwritten notations of uncertain origin, i.e., "1987 TRI 'ET Data Base" and "1993 ETS System" and do not change the result in the text even if admitted into evidence. I reject attempts to introduce evidence into the record through the medium of post-hearing briefs and the mentioned correspondence is not part of the evidentiary record in this proceeding.

violations affords no basis for a downward adjustment in the penalty (Id. 16, 17). This policy is also unexceptionable and no issue can or should be taken therewith. It is concluded, however, that the penalty adjustment factors in TSCA § 16 may not be compartmentalized and that the absence of prior violations is a factor to be considered in determining whether a respondent is a good corporate citizen and thus entitled to favorable consideration as to other aspects of the penalty calculation.

Acetone has been delisted and Complainant has expressed its willingness to reduce the penalty claimed for the acetone violations by 25% to reflect this fact.

"Attitude" is comprised of two components "cooperation" and "compliance", for each of which the ERP provides for an adjustment of up to 15% (Id. 18). Complainant excuses its failure to allow any adjustment for this factor by reference to its practice of considering such matters only in settlement negotiations. As I have already ruled, this position is simply arbitrary and may not be sustained. Ms. Tsai acknowledged that Catalina was cooperative, but nevertheless determined that the other adjustment factors set forth in EPCRA [and in the ERP] were not relevant (finding 19). Under these circumstances, I have no difficulty in determining that the 15% adjustment provided by the ERP for cooperation is applicable and will be applied.

More problematic is whether Catalina meets the compliance component of the "attitude" adjustment. Even though Catalina had submitted Form Rs for the calendar years at issue prior to the

filing of the complaint, Ms. Tsai justified the refusal to allow any adjustment for this factor in part by the assertion that they did not know whether the company (Catalina) was going to come into compliance (finding 17). On brief, Complainant emphasizes the almost six months which elapsed between the inspection on November 15, 1993 and the submittal of Form Rs (Response at 28, 29). The record shows that Catalina's plant was essentially shut down for four months following the Northridge, California earthquake, which occurred on January 17, 1994 (finding 28), and I conclude that the period for measuring Catalina's culpability, if any, in failing to submit Form Rs more quickly after it became aware of the requirement is the approximately two months between the inspection and the earthquake.

Following the inspection, Catalina immediately retained Mr. David Wright, an environmental consultant who had previously been retained to file reports required by the SCAQMD, to assist in the submittal of Form Rs. Mr. Douglas explained that [gathering the information to complete Form Rs] required quite a bit of research involving several chemicals going back several years and that even though some of these chemicals were below threshold [reporting quantities] the chemicals still had to be identified and that fact established. Mr. Douglas emphasized that completing Form Rs involved more than simply transposing information from reports to the SCAQMD. Although not emphasized by Mr. Douglas this involved estimating the percentage of styrene in the resins used in Catalina (finding 5). Moreover, it should be noted that, in

addition to the quantity of the toxic chemical manufactured, processed or otherwise used, Form R requires, inter alia, an indication of the maximum quantity of the chemical on site at any point in time the during the reporting year; information on releases to the environment including an estimate of total releases in pounds,. fugitive or non-point emissions, stack or point-air emissions, discharges to receiving streams including an indication of the percent of releases due to stormwater; releases to land on site and information on transfers of the chemical in wastes to off-site locations (40 CFR § 372.85). While it may well be that with maximum effort, Catalina might have submitted the Form Rs prior to the earthquake, I find that the record amply demonstrates its commitment to environmental compliance. Moreover, Catalina's record of being a good corporate citizen as demonstrated by its having no prior violations (finding 25) tips the scales in its favor. I conclude that Catalina is entitled to and will be granted the 15% compliance component of the attitude adjustment provided by the ERP.

This brings us to the last adjustment factor specified by TSCA § 16(2)(B) and the ERP "such other matters as justice may require." Examples of facts to be considered under this broad criterion set forth in the ERP are: new ownership for history of prior violations, "significant-minor" borderline violations, and lack of control over the violation (Id. 18). These are only examples, however, and the EAB in Spang & Company, supra made it clear that voluntary, previously incurred environmentally beneficial

expenditures could appropriately be considered as an adjustment factor under the rubric of "other matters as justice may require", even though such expenditures did not qualify as supplemental environmental projects (SEPs) under a strict interpretation of the ERP. Complainant defends its refusal to allow any adjustment under this factor in part by reference to its practice of considering such matters only in settlement negotiations (Response at 23). This practice is contrary to the statute, is contrary to the ERP, is simply arbitrary, and is rejected.

The first environmentally beneficial initiative for which Catalina claims credit is the substitution of a product known as DBE for acetone for cleaning purposes. DBE has very low emissions and reduced VOC emissions by two-thirds (finding 31). Mr. Douglas estimated the cost of installing heating equipment (a still) necessary for the use of DBE at $30,000, additional annual operating costs of $12,000 to $14,000, and additional annual labor costs of from $35,000 to $40,000 (finding 32). The fact of the almost total cessation of the use of acetone is not in doubt (findings 5 and 31).

Another environmentally beneficial initiative described by Mr. Douglas was the elimination of the use of anti-fouling paints on boat bottoms which had been offered to customers as an option (finding 33). This occurred in 1994 and he estimated the lost profit from the markup on this option at $28,000 to $30,000 a year. The third voluntary environmentally beneficial project described by Mr. Douglas involved the application of a brushable gel coat to the

outside surface of boats rather than using spray equipment to apply such materials (finding 34). Spraying the materials resulted in high styrene emissions and Mr. Douglas estimated that applying the gel coat with a brush would reduce styrene emissions by 15% to 20%. Brushing is more labor intensive than spraying, however, and he estimated additional labor costs at $16,000 to $22,000 a year. Foregone revenue and additional annual operating and labor costs of these environmentally beneficial projects thus approximate $100,000.

Complainant objects that these projects do not meet the criteria of Spang as environmentally beneficial projects which justice requires be considered in determining the penalty (Response at 25). Southern California's problems with VOCs and other air pollutants are well known, however, and the projects voluntarily undertaken by Catalina detailed herein are concerned with the reduction of emissions. These activities directly relate to the chemicals involved in the violations, a fact emphasized as significant in Spang. Moreover, these appear to be precisely the type of voluntary activities which should be encouraged and given the fact of Catalina's good corporate citizenship as evidenced by this record, I have no hesitancy in concluding that "justice" requires a downward adjustment in the gravity based penalty in recognition of these environmentally beneficial expenditures.

Complainant also objects that the expenditures are not sufficiently detailed and documented. It is true that the costs stated by Mr. Douglas were estimates and rough approximations.

Precision is not required, however, because environmentally beneficial expenditures do not offset gravity based penalty amounts dollar-for-dollar.

Catalina, arguing for elimination of the penalty intoto, has claimed expenditures for past voluntary environmental works totaling $308,000 and ongoing annual [voluntary] environmental works expenditures of from $91,000 to $106,000 (Opening Brief at 17). It is not clear how the past environmental expenditures of $308,000 were computed. Although the record reflects that Catalina reduced the quantity of acetone used to approximately ten percent of the threshold by the calendar year 1990 (finding 5), the project for the installation of equipment necessary for the conversion to the use of DBE was not completed until sometime in 1993 (finding 31). Presumably, annual increased operating and labor expenses of from $47,000 to $54,000 did not commence until the project was complete.

Likewise, the last anti-foulant paint, which was offered as an option to customers, was applied at an undisclosed date in 1994 and the lost revenue of from $28,000 to $30,000 per year from the markup on this option could not have commenced until that time. The evidence is that Catalina began brushing styrene gel coat on its boats rather than applying such materials with spray equipment in late 1995 (finding 34). The estimated $16,000 to $22,000 in annual increased labor costs attributable to this change had thus not been fully incurred at the time of the hearing.

Although increased annual operating costs or foregone revenues totaling approximately $100,000 from the environmentally beneficial activities described above are considered to be amply supported, uncertainties as to the dates the activities commenced lead me to conclude that credit for these activities should not exceed two years. The credit to be considered in adjusting the penalty will thus be $200,000 plus $30,000, the cost of installing equipment necessary to effectuate the change from the use of acetone to DBE. Such credits, however, may not entirely eliminate the penalty and it is my determination to allow 30 percent of $230,000 or $69,000 as a credit against the penalty.

The penalty is thus calculated as follows:

Gravity based penalty		$173,274
Less:30% attitude adjustment	=	$51,982
Acetone delisting (25% of $50,000)	=	$12,500
30% of $230,000 (voluntary environmental activities)	=	$69,000
Penalty	=	$39,792

The penalty of $39,792 is considered to be appropriate and will be assessed.

A final matter deserving brief mention is Catalina's contention that essentially the same information concerning toxic chemicals as required by Form Rs was available to residents of the area and interested persons through its outreach program and through reports it filed with the SCAQMD and the Los Angeles City or County Fire Departments. Although the record shows that there is a substantial

basis for this contention (findings 19-22), the evidence indicates that the information was not available in the same format or in the same manner as Form R information (finding 18). Mr. Douglas acknowledged that preparation of Form Rs involved more than the simple transposing of information from reports to the SCAQMD (finding 28). Moreover, equities favoring Catalina because of its lack of culpability and application of the "other matters as justice may require" penalty factor have been sufficiently taken into account by the penalty assessed. No further adjustment of the penalty is warranted.

ORDER

It having been determined that Respondent, Catalina Yachts, Inc., violated Section 313 of the Emergancy Planning and Community Right-To-Know Act, 42 U.S.C. § 11023, as alleged in the complaint, a penalty of $39,792 is assessed against it in accordance with Section 325(c) of the Act, 42 U.S.C. § 11045(c).[14/] Payment of the full amount of the penalty shall be made by mailing or delivering a certified or cashier's check payable to the Treasurer of the United States to the following address within 60 days of the date of this order:

[14/] Unless this decision is appealed to the Environmental Appeals Board (EAB) in accordance with Rule 22.30 (40 CFR Part 22), or unless the EAB elects to review the same sua sponte as therein provided, this decision will become the final order of the EAB and of the Agency in accordance with Rule 22.27(c).

Regional Hearing Clerk
U.S. EPA, Reg. IX
P.O. Box 360863
Pittsburgh, PA 15251-6863

Dated this 2nd day of February 1998.

Spencer T. Nissen
Administrative Law Judge

CERTIFICATE OF SERVICE

I hereby certify that the **INITIAL DECISION** in the matter of **CATALINA YACHTS (EPCRA-09-94-0015)**, issued by Administrative Law Judge, Spencer T. Nissen, dated February 2, 1998 has been filed with the Regional Hearing Clerk, and copies were served on Counsel for EPA, and on Respondent, as indicated below:

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Dated at San Francisco, California, this 10th day of February, 1998.

Danielle E. Carr
Regional Hearing Clerk
EPA, Region 9

BEFORE THE ENVIRONMENTAL APPEALS BOARD
UNITED STATES ENVIRONMENTAL PROTECTION AGENCY
WASHINGTON, D.C.

EAB Appeal No.

In The Matter Of:

Hall Signs, Inc.

Docket No. 5-EPCRA-96-026

Partial Appeal From The October 30, 1997
Initial Decision of the Presiding Officer,
Administrative Law Judge Andrew S. Pearlstein

APPELLANT'S BRIEF

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40 C.F.R. § 22.27;

40 CFR § 22.30(a);

Policy

"Enforcement Response Policy for Section 313 of the Emergency Planning and Community Right-to-Know Act," dated August 10, 1992, ("ERP");

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Davis, 3 *Administrative Law Treatise*, § 19.4 , at 325-26 (1980);

Koch, 1 *Administrative Law and Practice*, § 6.5, at 215 (pocket part, 1997)

BEFORE THE ENVIRONMENTAL APPEALS BOARD
UNITED STATES ENVIRONMENTAL PROTECTION AGENCY
WASHINGTON, D.C.

EAB Appeal No.

In The Matter Of:

Hall Signs, Inc.

Docket No. 5-EPCRA-96-026

Partial Appeal from the October 30, 1997 Initial Decision of the Presiding Officer, Administrative Law Judge Andrew S. Pearlstein

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APPELLANT'S BRIEF

The Appellant, the Chief of the Pesticides and Toxics Branch, Region 5, United States Environmental Protection Agency ("Complainant" in the proceedings below), by her attorney, Ignacio L. Arrázola, Associate Regional Counsel, submits this Brief in support of its appeal of the Initial Decision, dated October 30, 1997, issued by the Presiding Officer, Administrative Law Judge Andrew S. Pearlstein, in this matter. In accordance with 40 CFR § 22.30(a), Appellant states as follows:

I. STATEMENT OF THE ISSUE PRESENTED FOR REVIEW

Whether the Presiding Officer, in the context of an administrative penalty adjudication, exceeded his authority by finding the penalty matrix of the "Enforcement Response Policy for Section 313 of the Emergency Planning and Community Right-to-Know Act," to be "arbitrary and unauthorized by statute."

II. STATEMENT OF THE NATURE OF THE CASE

A. SUMMARY OF THE FACTS AND VIOLATIONS

The Respondent, Hall Signs, Inc. ("Hall Signs"), manufactures signs in Bloomington, Indiana[1]. *In the matter of Hall Signs, Inc.*, Docket No. 5-EPCRA-96-026, slip op. at 2 (ALJ, October 30, 1997) **(Attachment 1)**; Agreed Stipulations of Fact and Law ("STP"), ¶¶ 2, 9 **(Attachment 2)**. In the sign manufacturing process, Hall Signs uses phosphoric acid and certain glycol ethers as degreasing and drying agents. *Hall Signs*, slip op. at 2; STP, ¶¶ 10-13. With regard to certain glycol ethers, Hall Signs used 14,974 pounds in 1990 and 14,593 pounds in 1991. *Hall Signs*, slip op., at 3; STP, ¶¶ 24, 32. With regard to phosphoric

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[1] For a full treatment of the facts and violations in this matter, the reader may refer to either the Initial Decision or the parties' stipulations. Both are attached to this brief.

acid, Hall Signs used 15,179 pounds in 1990 and 17,453 pounds in 1991. *Hall Signs*, slip op. at 3; STP, ¶¶ 28, 36.

Section 313 of the Emergency Planning and Community Right-to-Know Act ("EPCRA"), 42 U.S.C. § 11023, required Hall Signs to submit information regarding such use of phosphoric acid and certain glycol ethers. Hall Signs failed to do so. *Hall Signs*, slip op. at 3; STP, ¶ 42. Under EPCRA § 313(a), covered persons (such as Hall Signs) are required to submit annually, no later than July 1 of each year, a Toxic Chemical Release Inventory Reporting Form ("Form R") for each toxic chemical listed under 40 CFR § 372.65 that was manufactured, imported, processed, or otherwise used during the preceding calendar year in quantities exceeding established chemical thresholds. 42 U.S.C. § 11023; *In re K.O. Manufacturing, Inc.*, 5 E.A.D. 798, at 799-800 (EAB 1995); *In the Matter of Hanlin Chemicals - West Virginia, Inc.*, 1995 FIFRA LEXIS 17, at 51 (ALJ, November 9, 1995).

EPCRA is intended to provide communities with information on potential chemical hazards within their boundaries. *In the matter of TRA Industries Inc.*, Docket No. EPCRA 1093-11-05-325, 1996 EPCRA LEXIS 1, at 5 (ALJ, October 11, 1996). Failure to comply with the reporting provisions of EPCRA Section 313(a) seriously

impairs the public's right-to-know. Id., at 7. Hall Signs did not comply with its reporting obligations for the calendar years 1990 and 1991 until almost five and six years respectively after the reporting deadlines. *Hall Signs*, slip op. at 3; STP, ¶¶ 26, 30, 34, 38.

The facts and violations of law in this matter were not controverted below, however. *Hall Signs*, slip op. at 2, 3-4; STP, ¶¶, 1-59. In lieu of a hearing, the parties stipulated to findings of fact and conclusions of law, and submitted briefs regarding the appropriate amount of a penalty. *Hall Signs*, slip op. at 2. Therefore, the sole issue left for the Presiding Officer to decide was the amount of the civil penalty.

B. **SUMMARY OF THE INITIAL DECISION**

On October 30, 1997, the Presiding Officer, Administrative Law Judge Andrew S. Pearlstein (the "ALJ"), issued an initial decision in the above matter. *In the matter of Hall Signs, Inc.*, Docket No. 5-EPCRA-96-026 (ALJ, October 30, 1997). The decision assessed a total penalty of $18,886 against Respondent Hall Signs, Inc. for four violations of Section 313 of EPCRA, 42 U.S.C. § 11023. *Hall Signs*, slip op. at 12. The Complainant had proposed a penalty of $57,800. *Hall Signs*, slip op. at 2; First

Amended Complaint, at 6-7. The Appellant does not challenge the $18,886 penalty assessment. The ALJ noted that the Complainant calculated its proposed penalty by following the guidelines in the "Enforcement Response Policy for Section 313 of the Emergency Planning and Community Right-to-Know Act," dated August 10, 1992, ("ERP")[2]. *Hall Signs*, slip op. at 5. However, the ALJ found the ERP to be "*arbitrary and unauthorized by statute*"[3]. *Hall Signs*,

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[2] A copy of the ERP is attached. **(Attachment 3)**

[3] The ALJ focused on the ERP's penalty matrix. The size of Hall Signs' business and the amount of chemicals involved placed Hall Signs just above the threshold between extent levels B and C in the matrix. *Hall Signs*, slip op. at 6; ERP, at 9. The ALJ found that the ERP's penalty matrix was "arbitrary" for the following reasons: (1) parties with the same violations could have drastically different penalties based on small differences in business size, (2) the ERP failed to explain why such slight differences in business size should result in great differences in the penalty; and (3) the ERP's use of the size of the business as a major factor in determining the "extent level" portion of the penalty matrix is inconsistent with the ERP's statement that the amount of the chemical involved in the violation is the *primary* factor in determining the extent level. *Hall Signs*, slip op. at 6-8. The ALJ found the ERP to be "unauthorized by statute" because the ERP's consideration of the size of a violator's business in determining the gravity of the violation was in error -- the size of the business relates to the *violator* as opposed to the *violation* and should not be considered in determining the gravity of the violation. *Hall Signs*, slip op. at 7. In other words, consideration of the size of business, in order to be consistent with EPCRA, should be treated as an ability to pay question, if raised in the proceeding. *Hall Signs*, slip op. at 8.

slip op., at 8 (emphasis supplied). Such finding is the sole matter for appeal here.

After finding the ERP's penalty matrix to be arbitrary and unauthorized by statute, the ALJ then posited his own "sliding scale or proportional scale" methodology for calculating a gravity-based penalty, based on the primary factor of amount of chemical involved: "[t]he penalty would increase $1000 for each 10,000 pounds of chemical used above the threshold, starting from a minimum of $5,000." *Hall Signs, Inc.*, slip. op. at 8-9, fn. 3.

III. ARGUMENT

A. THE PRESIDING OFFICER DOES NOT HAVE THE AUTHORITY TO STRIKE DOWN AGENCY POLICY.

Administrative law judges, unlike Article III judges, are creatures of statute, namely the Administrative Procedure Act ("APA"), 5 U.S.C. § 500, et seq. *See, e.g.,*; *Mullen v. Bowen*, 800 F.2d 535, 540 fn. 5 (6th Cir. 1986) (noting that there are "definite limits on the extent to which ALJ's may exercise their decisional dependence."); *Ass'n of Administrative Law Judges v. Heckler*, 594 F.Supp. 1132 (D.C. 1984) (stating that while ALJs are comparable to federal judges in many respects, on matters of law and policy, however, ALJs are entirely subject to the

Agency). The APA sets forth the role of administrative law judges in the context of adjudication.

Section 556(c) of the APA provides that "[s]ubject to published rules of the agency and within its powers, employees presiding at hearings may," among other things, "make or recommend decisions in accordance with section 557 of this title." 5 U.S.C. § 556(c). The "published rules of the agency," which an ALJ is "subject to," in the instance of administrative actions for penalties such as this one, are the "Consolidated Rules of Practice Governing the Administrative Assessment of Civil Penalties" ("Consolidated Rules"), 40 CFR Part 22[6]. Specifically, the Consolidated Rules state that "[t]he initial decision shall contain [the Presiding Officer's] findings of fact, conclusions regarding all material issues of law or discretion, as well as reasons therefor, a recommended civil penalty assessment, if appropriate, and a proposed final order." 40 C.F.R. § 22.27(a) (emphasis supplied). The Consolidated Rules also set forth an

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[6] In 40 CFR § 22.01(8), the Administrator provides that "[t]hese rules of practice govern all adjudicatory proceedings for . . .[t]he assessment of any administrative penalty under section 325 of [EPCRA]." The Administrator further provides that "[t]he Presiding Officer shall have the authority to conduct administrative hearings under these rules of practice[.]" 40 CFR § 22.04(c)(1).

ALJ's obligations with regard to her recommendation of a penalty assessment:

> "If the Presiding Officer determines that a violation has occurred, the Presiding Officer shall determine the dollar amount of the recommended civil penalty to be assessed in the initial decision in accordance with any criteria set forth in the Act relating to the proper amount of a civil penalty, *and must consider any civil penalty guidelines issued under the Act.* If the Presiding Officer decides to assess a penalty different in amount from the penalty recommended be assessed in the complaint, the Presiding Officer shall set forth in the initial decision the specific reasons for the increase or decrease." 40 CFR § 22.27(b) (emphasis supplied)

The preceding language defines the ALJ's role and authority in making an initial decision regarding a recommended civil penalty. The ALJ, in determining the appropriate penalty amount in this matter, exceeded his obligation to "consider" the penalty policy by taking the additional step of finding the penalty policy to be "arbitrary and unauthorized by statute." Neither the Consolidated Rules nor the APA explicitly give an ALJ the authority to invalidate agency policy. *See*, 40 CFR Part 22 and 5 U.S.C. §§ 500, *et seq.* Does the requirement to "consider" a penalty policy somehow bestow the ALJ with the authority to nullify the policy or a portion thereof? An examination of the judicial review provisions of the APA require a negative response to this question.

The term "arbitrary" resonates throughout the body of administrative law with the striking down of agency action. Chapter 7 of the APA, 5 U.S.C. §§ 701-706, sets forth provisions related to judicial review of agency action. Specifically, Section 706 of the APA states:

> The reviewing court shall . . . hold unlawful and set aside agency action, findings, and conclusions found to be . . . *arbitrary*, capricious, an abuse of discretion, or otherwise not in accordance with law.

5 U.S.C. § 706(2)(A) (emphasis supplied).

As such, a reviewing court must strike down agency action that it finds to be "arbitrary." However, the "reviewing court" in the context of an EPCRA § 325 administrative penalty assessment is the federal district court. *See*, 42 U.S.C. § 11045(f)(1). Thus, the function of striking down agency action as "arbitary" or otherwise unlawful is left to an Article III judge under the structure set forth by the APA[5]. On the other hand, as a general statement of policy, the ERP is not a binding norm or legislative rule to which the ALJ must adhere.

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[5] The Appellant does not question the Environmental Appeals Board's authority to modify Agency policy or otherwise speak for the Agency, however.

Consistent with Rule 22.27(b), recited above, the Environmental Appeals Board ("EAB") has "repeatedly stated that a Presiding Officer, having considered any applicable civil penalty policy guidelines is nonetheless free not to apply them to the case at hand." *In re Employer's Insurance of Wassau and Group Eight Technology, Inc.*, TSCA Appeal No. 95-6, slip op. at 33 (EAB, February 11, 1997)(citations omitted); *also see, In re DIC Americas, Inc.*, TSCA Appeal No. 94-2, slip op. at 6 (EAB, September 27, 1995). "The Presiding Officer's penalty assessment decision is ultimately constrained only by the statutory criteria and by any statutory cap limiting the size of the assessable penalty, by the Agency's regulatory requirement (40 CFR 22.27(b)) to provide 'specific reasons' for rejecting the complainant's penalty proposal, and by the general Administrative Procedure Act requirement that a sanction be rationally related to the offense committed (i.e., that the choice of sanction not be an 'abuse of discretion' or otherwise arbitrary and capricious)." *Wassau*, slip. op., at 33. The *Hall Signs* decision erroneously conflates the ALJ's obligation to avoid imposing an arbitrary sanction with the judicial review function, left to the federal courts, of striking down arbitrary agency action.

There is an important distinction to be made here: the freedom of an ALJ not to apply the penalty policy (after having considered it), set forth in 40 CFR § 22.27(b), does not confer upon the ALJ the authority to strike down Agency policy, set forth in 5 U.S.C. § 706(2)(A). A failure to make this distinction has important consequences. If an ALJ is free to upend Agency policy, the seat of the Agency's policy-making function is no longer completely with the Administrator, who is able to draw on the expertise of the entire institution. If each ALJ may sit in judgment of Agency policy, policy-making becomes dependent on the insular decision-making process of the ALJ[6].

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[6]Authorities on administrative law have questioned the wisdom of allowing ALJs to engage in policymaking. *See*, Davis, 3 *Administrative Law Treatise*, § 19.4 , at 325-26 (1980) ("[A]n agency may be much better equipped than a court to work out difficult problems of policy, because a court is made up of legally trained judges, whereas an agency may draw upon a staff that is made up of various kinds of specialists. . . .The central weak spot in the system is the ALJ, who is in effect forbidden from informal association with the agency's policymakers."); *also see*, Koch, 1 *Administrative Law and Practice*, § 6.5, at 215 (pocket part, 1997) ("Presiding officials become very familiar with the legal and policy issues presented by a particular area of law and naturally form some views on those issues. It is not improper for the administrative judge to have a view on the law or to have a strong desire to further particular policies. . . . On the other hand, a presiding official is not a policymaker.")

The Administrator has directed that a civil penalty proposed in a complaint "shall be determined" not only in accordance with any applicable statutory penalty criteria, but also in accordance "with any civil penalty guidelines issued under the Act." 40 CFR § 22.14(c). It makes no sense for the Administrator to issue a penalty guideline such as the ERP, if each ALJ is recognized as having the authority to strike it down and establish a penalty calculation methodology more to his own liking. Under such a system, there may be as many penalty calculation methodologies as there are ALJs. Moreover, such a system would place Agency complainants in a bind. For example, would a complainant in front of Judge Pearlstein calculate a proposed penalty pursuant to Judge Pearlstein's methodology as set out in *Hall Signs* or the ERP's penalty matrix? The Consolidated Rules of Practice require that, when issuing a complaint, the "dollar amount of the proposed civil penalty shall be determined in accordance with any criteria set forth in the Act relating to the proper amount of a civil penalty and with any civil penalty guidelines issued under the Act." 40 CFR 22.14(c). Thus, the Agency complainant is required to propose penalties in accordance with the Administrator's penalty guidelines. This requirement would not make much

sense in a world where each ALJ may have his own penalty calculation methodology.

In pragmatic terms, allowing ALJs to dictate the Agency's penalty guidelines would lead to less uniform assessment of penalties. If each of the several ALJs has the authority to establish his or her own penalty calculation methodology, wouldn't the penalty assessment then depend primarily on which ALJ was assigned to the case? Such a system would generate arbitrary results. If an ALJ is acknowledged to have the discretion to invalidate the Administrator's penalty policy and devise a different policy the ALJ might think to be a good idea, the Administrator's penalty assessment process becomes nothing more that an "ad hoc" process. "When disposition depends more on which judge is assigned to the case than on the facts or the legal rules, the tendency is to describe the system as lawless, arbitrary, or the like, even though the case assignment is random." *Santise v. Schweiker*, 676 F.2d 925, at 930 (3rd Cir. 1982).

Reasonable persons may differ regarding the merits of the ERP's penalty calculation methodology as compared to the *Hall Signs* sliding scale methodology. The Appellant, however, does

not have the authority to address the important question of whether the ERP should be modified as a result of the criticisms raised by the *Hall Signs* decision. But, the supposed flaws with the ERP and any perceived merits of a sliding scale penalty calculation methodology discussed in *Hall Signs* should not obscure the larger point raised by this appeal: the Presiding Officer does not have the authority to set aside Agency policy. The Presiding Officer's job is to recommend an appropriate penalty assessment, not dictate Agency policy. Even if the EAB on this appeal (or the Agency at some later point) modifies the ERP or accepts the *Hall Signs* penalty calculation methodology whole cloth, will the ALJs have the authority to find such a policy determination unlawful as well?

B. AN APPROPRIATE PENALTY MAY BE ASSESSED WITHOUT INVALIDATING THE ERP

The ALJ could have assessed the same penalty in a fashion that was within his authority. It was unnecessary for the ALJ to invalidate the penalty policy in order to arrive at a just penalty amount[7]. While an Agency complainant is required to

[7] It should be noted that both the EAB as well as the ALJ in this case have applied the ERP in order to calculate appropriate

propose a penalty assessment in accordance with the Administrator's penalty guidelines, the ALJ is not constrained to apply the penalty guidelines inflexibly. *Compare* 40 CFR § 22.14 *and* 40 CFR § 22.27(b).

In a final decision issued by the Chief Judicial Officer, it was recognized that "[t]here is nothing in the guidelines which suggests that a presiding officer is required to assess a penalty in an amount which is identical to one of the amounts shown in the matrix[,]" and that "it is better to view the amounts shown in the matrix as points along a continuum, representing convenient benchmarks for purposes of proposing and, in some instances, assessing penalties." *In Re Bell & Howell Company*, 1 E.A.D. 811, 822-23 (CJO 1983). Moreover, the ALJ issuing the *Hall Signs* initial decision, in an earlier initial decision, without reference to *Bell & Howell*, recognized that "there is no logical reason that violations in projects involving borderline amounts of RACM could not be assigned a gravity component between the two arbitrary choices offered by the Asbestos Penalty Pol-

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penalties for EPCRA Section 313 violations. *See, In re Pacific Refining Company*, 5 E.A.D. 607 (EAB 1994); *In the matter of Hanlin Chemicals - West Virginia, Inc.*, 1995 FIFRA LEXIS 17, (ALJ, November 9, 1995).

icy." *In the matter of Ocean State Asbestos Removal, Inc.*, Docket No. CAA-1-93-1054, at 7 (January 24, 1997).

Consequently, by viewing the ERP's penalty matrix as a continuum of penalty amounts, the ALJ could quite easily have arrived at the penalty amount he did without finding the ERP to be "arbitrary and unauthorized by statute." The ALJ could have reviewed the calculation proposed by Complainant under the ERP, found that penalty amount to be too high on the "extent" level of the matrix based upon the specific facts of the case (volume of sales and number of employees just over the threshold for extent level B), and reduced the gravity-based penalty to a figure in the range between $17,000 (extent level B) and $5,000 (extent level C).

IV. RELIEF REQUESTED

The Appellant requests that EAB set aside the ALJ's finding that the ERP is "arbitrary and unathorized by statute" as exceeding his authority. The Appellant further requests that Hall Signs, Inc. be ordered to pay a civil penalty of $18,886, the same amount assessed in the Initial Decision.

V. CONCLUSION

The Consolidated Rules and the Administrative Procedure Act define the authority and the role of the ALJ for the assessment of civil penalties in this matter. *See*, 40 CFR § 22.27; 5 U.S.C. §§ 556-557. While the ALJ must "consider" the ERP in determining the recommended civil penalty, the ALJ is free to assess a penalty different to the one proposed by the complainant. 40 CFR § 22.27(b). However, the ALJ's discretion to deviate from the penalty policy (after having considered it), does not confer upon the ALJ the authority to strike down Agency policy, as set forth in 5 U.S.C. § 706(2)(A). Therefore, the ALJ, in finding the ERP to be "arbitrary and unauthorized by statute," exceeded his statutory and regulatory authority.

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Respectfully submitted,

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